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Hendrickx, F.H.R.

Published in:
European Labour Law Journal

Publication date:
2010

Document Version
Publisher's PDF, also known as Version of record

THE *BERNARD*-CASE AND TRAINING COMPENSATION IN PROFESSIONAL FOOTBALL

Frank Hendrickx*

Keywords: European Court of Justice; free movement of workers; professional football; training compensation

INTRODUCTION

On 16 March 2010 the European Court of Justice delivered its judgment in the case of *Olympique Lyonnais SASP v Olivier Bernard, Newcastle United FC*, in short referred to as the "*Bernard case*".[1] In this contribution, which is conceived as a case note, an overview and analysis of the *Bernard* case is provided. This is done, seen its relevance in the discussion, in comparison with the *Bosman* case.[2]

The *Bernard* case shows a lot of resemblance with the *Bosman* case. In both cases, the European Court of Justice considered professional sport, more in particular football in a European context, as an economic activity. On each occasion, a violation was found of European Union law, as there was an irregular limitation of the free movement of workers. Both the *Bosman* and the *Bernard* case also have a relevance outside the world of sport. They consider a broader labour market problem, which is the encouragement of training of talented workers and the protection of human capital investment of the employer.

At the end of this contribution, an attempt is made to go beyond a mere comparison of the *Bosman* and *Bernard* cases. Taking the cases together, an attempt is made to define the conditions under which a training compensation in professional football could be considered valid under European free movement law.

* Frank Hendrickx is Professor of Labour Law at the University of Leuven and Jean Monnet Professor at ReflecT, Tilburg University.

1 C-325/08.

2 ECJ, *Bosman*, C-415/93, E.C.R. 1995, I-4921.

1. A BRIEF OVERVIEW OF THE *BERNARD* CASE

1.1. FACTS

Olivier Bernard is a football player who signed a so-called 'promising player'-contract ("*joueur espoir*") with the French football club *Olympique Lyonnais*, for three seasons, with effect from 1 July 1997. Before that contract was due to expire, *Olympique Lyonnais* offered him a professional contract for one year from 1 July 2000.[3]

Olympique Lyonnais seemed to act in line with the applicable Professional Football Charter, which, at the time, regulated employment of football players in France. This Charter had the status of a collective agreement and included the position of '*joueurs espoir*', like Bernard (i.e. players between the ages of 16 and 22 employed as trainees by a professional club under a fixed-term contract).[4] At the end of his training with a club, the Charter obliged a '*joueur espoir*' to sign his first professional contract with that club, if the club required him to do so.[5]

Bernard, however, apparently dissatisfied with the salary proposed, did not accept the offer of *Olympique Lyonnais* but, instead, in August 2000, signed a professional contract with the English club *Newcastle United*.[6]

On learning of that contract, *Olympique Lyonnais* sued Bernard before the *Conseil de prud'hommes* (Employment Tribunal) in Lyon, seeking an award of damages jointly against him and *Newcastle United*. The amount claimed was EUR 53 357.16 which was the equivalent to the remuneration which Bernard would have received over one year if he had signed the contract offered by *Olympique Lyonnais*.[7] The *Conseil de prud'hommes* considered that Bernard had terminated his contract unilaterally, and ordered him and *Newcastle United* jointly to pay *Olympique Lyonnais* damages of EUR 22 867.35 on the basis of Article L. 122–3–8 of the French Employment Code.[8] This article provided: "In the absence of agreement between the parties, a fixed term contract may be terminated before the expiry of the term only in the case of serious misconduct or force majeure. (…) Failure on the part of the employee to comply with these provisions gives the employer a right to damages corresponding to the loss suffered."[9]

3 Cf. AG Sharpston, *Bernard*, paragraph 18.

4 *Bernard*, paragraph 3.

5 *Bernard*, paragraph 4.

6 Cf. AG Sharpston, *Bernard*, paragraph 18.

7 Cf. AG Sharpston, *Bernard*, paragraph 19.

8 Cf. AG Sharpston, *Bernard*, paragraph 20.

9 *Bernard*, paragraph 6.

1.2. DEBATE AND ISSUE

The Court of Appeal quashed the judgment of the *Conseil de prud'hommes*. It considered that the obligation on a player to sign, at the end of his training, a professional contract with the club which had provided the training, also prohibited the player from signing such a contract with a club in another Member State and thus infringed Article 45 TFEU.[10] At this procedure, it became clear, in particular, that there was no provision specifying the compensation to be paid in respect of training in the event of premature termination.[11]

In further appeal, the French *Cour de cassation* considered that the Charter did not formally prevent a young player from entering into a professional contract with a club in another Member State, but nevertheless, its effect was to hinder or discourage young players from signing such a contract, inasmuch as breach of the provision in question could give rise to an award of damages against them.[12] In this context, and having regard to the principles of the *Bosman* case, the *Cour de Cassation* decided to stay the proceedings and refer the case to the European Court of Justice for a preliminary ruling.

The question was whether the rules according to which a '*joueur espoir*' may be ordered to pay damages if, at the end of his training period, he signs a professional contract, not with the club which provided his training, but with a club in another Member State, constitute a restriction within the meaning of Article 45 TFEU and, if so, whether that restriction is justified by the need to encourage the recruitment and training of young players.

1.3. REASONING OF THE COURT

The Court's reasoning follows basically three steps, in line with the mechanisms used in free movement law and, in particular, as they were applied in the *Bosman* case, to which the Court regularly refers.

1. *Limitation of the freedom of movement*: After having established that Bernard's gainful employment falls within the scope of Article 45 TFEU,[13] the Court examines whether there is a restriction on the freedom of movement. It finds that rules according to which a 'joueur espoir', at the end of his training period, is required, under pain of being sued for damages, to sign a professional contract with the club which trained him are likely to discourage that player from exercising his right of free movement.[14] The Court reasons that, although such rules do not formally prevent the player from signing a professional contract with a club in another Member State, it none the less

10 *Bernard*, paragraph 12.

11 Cf. AG Sharpston, *Bernard*, paragraph 21.

12 *Bernard*, paragraph 14.

13 *Bernard*, paragraph 29.

14 *Bernard*, paragraph 35.

makes the exercise of that right less attractive.[15] The Court's conclusion is, therefore, that the rules in question are a restriction on the freedom of movement for workers guaranteed under Article 45 TFEU.[16]

2. *Justification*: Subsequently, the Court moves on to the issue of justification. The Court, indeed, reminds that a measure which constitutes an obstacle to the freedom of movement can be accepted, but only if it pursues a legitimate aim, is justified by overriding reasons in the public interest, and if application of the measure ensures achievement of the objective in question and does not go beyond what is necessary for that purpose.[17] In this context, referring to *Bosman*, the Court holds "that, in view of the considerable social importance of sporting activities and in particular football in the European Union, the objective of encouraging the recruitment and training of young players must be accepted as legitimate".[18] The Court states that "account must be taken (…) of the specific characteristics of sport in general, and football in particular, and of their social and educational function. The relevance of those factors is also corroborated by their being mentioned in the second subparagraph of Article 165(1) TFEU."[19] The Court repeats its position held in *Bosman*, that "the prospect of receiving training fees is likely to encourage football clubs to seek new talent and train young players".[20] The Court specifies that "the clubs which provided the training could be discouraged from investing in the training of young players if they could not obtain reimbursement of the amounts spent for that purpose where, at the end of his training, a player enters into a professional contract with another club. In particular, that would be the case with small clubs providing training, whose investments at local level in the recruitment and training of young players are of considerable importance for the social and educational function of sport".[21]

3. *Adequacy and proportionality*: While the Court accepts that "a scheme providing for the payment of compensation for training where a young player, at the end of his training, signs a professional contract with a club other than the one which trained him can, in principle, be justified by the objective of encouraging the recruitment and training of young players",[22] it nevertheless stressess that "such a scheme must be actually capable of attaining that objective and be proportionate to it, taking due account of the costs borne by the clubs in training both future professional players and those who will never play professionally".[23] The Court notes that the training compensation scheme "was characterised by the payment to the club which provided

15 *Bernard*, paragraph 36.

16 *Bernard*, paragraph 37.

17 Paragraph 38.

18 Paragraph 39.

19 Paragraph 40.

20 Paragraph 41.

21 Paragraph 44.

22 Paragraph 45.

23 *Idem*.

the training, not of compensation for training, but of damages, to which the player concerned would be liable for breach of his contractual obligations and the amount of which was unrelated to the real training costs incurred by the club."[24] The Court subsequently concludes that "the possibility of obtaining such damages went beyond what was necessary to encourage recruitment and training of young players and to fund those activities".[25]

1.4. DECISION

The conclusion of the Court is that:

1. Article 45 TFUE does not preclude a scheme which, in order to attain the objective of encouraging the recruitment and training of young players, guarantees compensation to the club which provided the training if, at the end of his training period, a young player signs a professional contract with a club in another Member State, provided that the scheme is suitable to ensure the attainment of that objective and does not go beyond what is necessary to attain it.
2. A scheme (…) under which a 'joueur espoir' who signs a professional contract with a club in another Member State at the end of his training period is liable to pay damages calculated in a way which is unrelated to the actual costs of the training, is not necessary to ensure the attainment of that objective.

2. TRAINING COMPENSATION FROM *BOSMAN* TO *BERNARD*

As mentioned before, the *Bernard* case shows a lot of resemblance with the *Bosman* case. In fact, *Bernard* can be seen as an expected follow-up of the *Bosman* case. It would thus be appropriate to analyse the *Bernard* case in comparison with the *Bosman* ruling.

2.1. FACTS AND SETTING

The facts in the *Bosman* and *Bernard* cases are quite similar. Nevertheless, there is also some degree of difference. Jean-Marc Bosman was a professional football player and the contract with his club-employer came to an end before he wanted to move for playing in France. Olivier Bernard, a so-called 'promising player' ("*joueur espoir*"), is considered, like Bosman, as a professional player. Bernard came at the end of his training period with his club-employer (*Olympic Lyon*), but not at the end of his contractual obligations versus his club-employer. His transfer to the English club

24 Paragraph 46.

25 Paragraph 48.

Newcastle United implied a violation of his promise to play another year for *Olympic Lyon*. This violation, according to French labour law and as shown in the case, was qualified as a premature and unlawful unilateral termination of an employment contract for a fixed duration.

In *Bernard*, the Court held that, in such a case, the club which provided the training could bring an action for damages against the '*joueur espoir*' under Article L. 122-3-8 of the French Employment Code, for breach of the contractual obligations. Article L. 122-3-8 of the French Employment Code, in the version applicable to the facts in the proceedings, provided that "In the absence of agreement between the parties, a fixed term contract may be terminated before the expiry of the term only in the case of serious misconduct or force majeure. (…) Failure on the part of the employee to comply with these provisions gives the employer a right to damages corresponding to the loss suffered."

The importance of the fact that the *Bernard* case differs at this point with *Bosman*, seems to be only relative. Indeed, the Court's conclusion in *Bernard* on the issue of training compensations can also be applied to players transfers at the end of the contract. However, the *Bernard*-hypothesis may have some further relevance when related to the contract stability provisions and compensation-for-breach-principles in labour law. This will be shown further below.

2.2. HISTORICAL CONNECTION

On the basis of the *Bosman*-judgment, the then applicable FIFA-transfer system was to be considered contrary to European Union law. In order to find a solution for the issue of players' transfers and training compensation in European professional football, the European Commission and the football representatives came together. In August 2000 the football world expressed its willingness to modify the transfer rules. A procedure of negotiations started between FIFA and the European Commission and in a common statement of 14 February 2001, coming from Commissioners Monti, Reding and Diamantopoulou, as well as FIFA-president Blatter en UEFA-president Johansson, a declaration of principles was adopted concerning a number of essential issues that should lay the basis for a new FIFA-transfer regulation.

In this declaration, the principle of compensation for training costs was accepted. However, with regard to the method of calculation of these training costs, no agreement existed. The Commission emphasised that this was for the football bodies to develop, but also that in light of European Union law, these training costs must reflect the actual incurred costs of training and cannot form a disproportionate limitation of the free movement.

A final agreement was concluded on 5 March 2001 on the basis of an exchange of letters between Commissioner Monti and FIFA-president Blatter.[26] This exchange of letters concerns a document called "*Principles for the amendment of FIFA rules regarding the International Transfers*". According to the words used by Blatter, the document reflects the discussion between FIFA and the European Commission. The document comprises a sort of package of principles relating to certain aspects involving the protection of minors, a training compensation for young players (i.e. until 23 years old), the principle of contract stability, a solidarity mechanism, the principle of transfer windows and the creation of an arbitration system.

These 'principles' are, therefore, not the FIFA-regulation as such. These regulations were adopted separately and in more detail by FIFA, on the basis of the declaration of principle. In a meeting of the European Parliament on 13 March 2001, Commissioner Reding defended this method of operation and the Commission's attitude by stating that the application in detail of the principles is a matter for FIFA to deal with and that the European Commission will see to it that the implementation of the 'principles' will be effectively realised.[27]

On 5 July 2001 a new FIFA regulation concerning the status and transfer of players, involving a traning compensation system, was adopted. The FIFA rules were later modified, but the system has remained the same every since. Therefore, there was a lot of interest to know how the European Court of Justice would evaluate this new training compensation system under European Union law, especially in the context of free movement of workers. It must be pointed out that the *Bernard* case does not involve an explicit evaluation of the FIFA regulations. However, both the involved parties as well as the Advocate-General noted the fact that FIFA adopted new rules at the time of the proceedings. These rules, as is explained in the Advocate-General's opinion and by the submissions of the parties, governed situations such as that of Bernard but were not in force at the material time of the case.

As they were adopted in order to seek compliance with the Court's case-law, in particular the judgment in *Bosman* and as the French Professional Football Charter contained comparable rules for domestic situations, some parties requests the Court to give "its blessing to the rules currently in force".[28]

However, the Court did not evaluate the FIFA rules, but it seems obvious that the reasoning of the Court in *Bernard* can, at least implicitly, be used to evaluate the existing FIFA rules.

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26 Cf. R. Parrish, *Sports law and policy in the European Union*, Manchester, Manchester University Press, 2003, 148.

27 *Idem*; Meeting of 13 March 2001.

28 AG Sharpston, *Bernard*, paragraph 60–61.

2.3. UNDERLYING PROBLEM

What is now the real issue in the *Bosman* and *Bernard* cases as far as training compensation is concerned? The *Bosman* ruling considered the existing transfer rules contrary to European Union law. The argument that this system was designed to address training efforts of clubs, did not sufficiently convince the Court. However, the conflict between the FIFA rules and European Union law did not relate to the question *whether* the requirement to pay for training compensation would be legitimate. According to the *Bosman* ruling, training compensation is not, *per se*, unjustified. The question is, more precisely, *under what conditions* training compensation would be compatible with the free movement of workers and, in light thereof, how the fees for compensation should be calculated and payable.

In the negotiations with the European Commission, mentioned above, training compensation was also accepted as a matter of principle. But the exchange of letters of 5 March 2001 between the European Commission and FIFA did not give any indication as regards the exact amounts (of training compensation) that would be payable in the new system. For example, FIFA pointed to a cap for training compensation, in order to avoid a disproportionate obligation to pay such fees.[29]

From the beginning it was made clear that it is quite difficult to effectively calculate the training cost for every player individually. Therefore, a system of fixed tariffs would be applicable and clubs were categorised in conformity with their financial investment in training of players. Also in the new FIFA rules (since 2001), the idea of a fixed amount, depending on certain factors, for training compensation is laid down. The actual FIFA rules provide that "training compensation shall be paid to a player's training club(s): (1) when a player signs his first contract as a professional and (2) each time a professional is transferred until the end of the season of his 23rd birthday. The obligation to pay training compensation arises whether the transfer takes place during or at the end of the player's contract."[30] Also a training period is defined. "A player's training and education takes place between the ages of 12 and 23. Training compensation shall be payable, as a general rule, up to the age of 23 for training incurred up to the age of 21, unless it is evident that a player has already terminated his training period before the age of 21."[31]

2.4. CONSIDERATIONS WITH REGARD TO TRAINING COMPENSATION

It is relevant to have a look at the different considerations and positions of the European Court of Justice before drawing further conclusions with regard to the legal conditions

29 Cf. R. Blanpain, *The legal status of sportsmen and sportswomen under international, European and Belgian national and regional law*, The Hague, Kluwer Law International 2003, 52.

30 Article 20 FIFA Regulations on the status and transfer of players (version 2010).

31 Annex 4, FIFA Regulations on the status and transfer of players (version 2010).

under which training compensation may be justified in light of the European free movement provisions. There are some differences in the respective reasonings, but there is also a large degree of uniformity.

A number of principles are similar in both the *Bosman* and the *Bernard* case. In *Bosman*, the Court already approved the principle of training compensation as it made clear that, "in view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate".[32] Furthermore, in both *Bosman* and *Bernard*, the Court recognises that "the prospect of receiving transfer, development or training fees is indeed likely to encourage football clubs to seek new talent and train young players".[33] In both cases, the Court refuses to accept a system of compensation that does not relate to the actual costs of training.[34]

A degree of variation in reasoning can be found in the Court's more detailed assessment of traning compensation in professional football. In both the *Bosman* and *Bernard* case, the Court recognises that there are some difficulties in establishing an individual training cost per player. In *Bosman* the Court stresses that "it is impossible to predict the sporting future of young players with any certainty and because only a limited number of such players go on to play professionally, those fees are by nature contingent and uncertain".[35] In *Bernard*, the Court points out that "the returns on the investments in training made by the clubs providing it are uncertain by their very nature since the clubs bear the expenditure incurred in respect of all the young players they recruit and train, sometimes over several years, whereas only some of those players undertake a professional career at the end of their training, whether with the club which provided the training or another club".[36]

In *Bosman*, this fact seems to weigh in the Court's rejection of the (lump sum based) training compensation system at issue. Taking into account the point of the uncertainties in the calculation of costs, it concludes that "the prospect of receiving such fees cannot, therefore, be either a decisive factor in encouraging recruitment and training of young players or an adequate means of financing such activities, particularly in the case of smaller clubs."[37] In *Bernard*, the Court does not seem to be hindered anymore by the argument of uncertainty in the calculation of training compensation, as it holds that "under those circumstances, the clubs which provided the training could be discouraged from investing in the training of young players if

32 *Bosman*, paragraph 106.

33 *Bosman*, paragraph 108; Cf. *Bernard*, paragraph 41.

34 *Bosman*, paragraph 109; *Bernard*, paragraph 46 and paragraph 50.

35 *Bosman*, paragraph 109.

36 *Bernard*, paragraph 42.

37 *Bosman*, paragraph 109.

they could not obtain reimbursement of the amounts spent for that purpose where, at the end of his training, a player enters into a professional contract with another club. In particular, that would be the case with small clubs providing training, whose investments at local level in the recruitment and training of young players are of considerable importance for the social and educational function of sport."[38] The Court would nevertheless adopt further conditions for a valid training compensation system. But it would appear that the suggestion has been made that the issue of specificity of sport has added up to the defense of the training compensation schemes. That issue will be addressed below.

2.5. SPECIFICITY OF SPORT VERSUS THE BROADER LABOUR MARKET

The issue of training compensation is not a discussion that only concerns professional footbal or sport. Also the broader labour market is concerned with investment in training and education of workers, in short human capital development. There is equally an employer concern of keeping a return on investment when a worker has been trained on his expenses.

More precisely, the Netherlands government has pointed at this broader debate in the *Bernard* case. It referred to the fact that "the Lisbon Strategy adopted by the European Council in March 2000, and the various decisions and guidelines adopted since then with a view to its implementation in the fields of education, training and lifelong learning, accord primordial importance to professional training in all sectors." It continued "if employers can be sure that they will be able to benefit for a reasonable period from the services of employees whom they train, that is an incentive to provide training, which is also in the interests of the employees themselves."[39]

In this light, it is then relevant to verify what role the specificity of sport has played in the Court's reasoning in the *Bernard* case. About this specificity of sport, indeed, a lot has been said already and it is often used as an argument for exceptions or exemptions with regard to sporting issues under European Union law.[40] It is to be remembered that the Court has held that, having regard to the objectives of the Community, sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of the Treaty.[41] This doctrine, confirmed in later case law, has allowed the Court to exclude certain matters from the scope or operation of the Treaty. As the Court's proposition would seem to be that sport *does not*, in principle, fall under Community law, *unless* it concerns an economic activity,

38 *Bernard*, paragraph 44.

39 Opinion AG Sharpston, *Bernard*, paragraph 48.

40 R. Siekmann, "Is sport special in EU law and policy?", in R. Blanpain, M. Colucci en F. Hendrickx (eds.) *The future of sports law in the European Union. Beyond the EU Reform Treaty and the White Paper*, Bull. Comp. Lab. Rel. 2008, Vol. 66, 37–49.

41 Case 36/74, *Walrave v. Union Cycliste Internationale*, E.C.R. 1974, 1405, paragraph 4.

it could be referred to as creating a doctrine of specificity of sport. It has, however, also become clear that the Court's concept of what constitutes an economic activity has been a quite broad one.

Interesting is to first point to Advocate-General Sharpston's paragraph 30, where she notes that: "The specific characteristics of sport in general, and football in particular, do not seem to me to be of paramount importance when considering whether there is a prohibited restriction on freedom of movement. They must, however, be considered carefully when examining possible justifications for any such restriction – just as the specific characteristics of any other sector would need to be borne in mind when examining the justification of restrictions applicable in that sector." This seems to confirm the view that the notion of specificity of sport cannot be used as a sort 'standard clause' or 'style formula' to exclude sport from any further requirement of justifying limitations on the free movement of workers. A mere reference to the specificity of sport is, therefore, not sufficient. It would thus also require that specific reasons for the justification of training compensation are being put forward. It is also clear that this possibility of specific justification stands open for any other sector of activity in the labour market. One might indeed imagine that other 'sectoral' labour markets, such as those of pilots, artists, scientists, etc. are capable of producing a set of specific characteristics on the basis of which a limitation on the free movement by a training compensation scheme could be justified.

The advantage for the sports sector, however, is that the specific characteristics of sport are 'officially' recognised by the European institutions and enshrined in the Treaty on the Functioning of the European Union. Article 165(1) TFEU provides that "the Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function". The Avocate-General also states that "professional football is not merely an economic activity but also a matter of considerable social importance in Europe. Since it is generally perceived as linked to, and as sharing many of the virtues of, amateur sport, there is a broad public consensus that the training and recruitment of young players should be encouraged rather than discouraged. More specifically, the European Council at Nice in 2000 recognised that 'the Community must … take account of the social, educational and cultural functions inherent in sport and making it special, in order that the code of ethics and the solidarity essential to the preservation of its social role may be respected and nurtured'. In addition, the Commission's White Paper on sport and the Parliament's resolution on it both place considerable stress on the importance of training.[42]

The Court has attached importance to this reference, where it states that "account must be taken, as the Advocate-General states in points 30 and 47 of her Opinion, of the specific characteristics of sport in general, and football in particular, and of their

42 AG Sharpston, *Bernard*, paragraph 47.

social and educational function. The relevance of those factors is also corroborated by their being mentioned in the second subparagraph of Article 165(1) TFEU."[43]

2.6. EMPLOYMENT LAW PERSPECTIVES IN AND BEYOND SPORT

It has been suggested above that the meaning of the *Bernard* case is broader than the world of sport. The question then arises how the Court's judgment is related to employment law principles. Furthermore, as will be pointed out, there are also links with the contract stability issue in sport, such as in professional football.

During the time of the facts of the case, Bernard was employed with Olympic Lyon under a contract that was governed by French employment law as well as by a 'Charter' which had the legal status of a collective agreement under French law.

It should be pointed out, in this context, that Bernard was held liable, under French law, for breach of his contractual obligations. More precisely, following Article L. 122–3–8 of the French Employment Code, in the version applicable to the facts in the proceedings, he was held liable for breach of a fixed-term employment contract, that could "be terminated before the expiry of the term only in the case of serious misconduct or force majeure. (…) Failure on the part of the employee to comply with these provisions gives the employer a right to damages corresponding to the loss suffered".[44] The Court has made specific, on the basis of the French Government's statements, that pursuant to the French Employment Code, "the damages in question were not calculated in relation to the training costs incurred by the club providing that training but in relation to the total loss suffered by the club. In addition, as Newcastle United FC pointed out, the amount of that loss was established on the basis of criteria which were not determined in advance."[45] The Court then comes to the conclusion that "under those circumstances, the possibility of obtaining such damages went beyond what was necessary to encourage recruitment and training of young players and to fund those activities."[46]

Relevant to note is that, like in France, some employment laws in European jurisdictions would operate the calculation of damages for breach of a fixed-term employment contract on the basis of the residual value of the contract or on a comparable lump sum basis.[47] The question is whether such determination may include lost investment in training. If the Court's reasoning in *Bernard* is followed, a lump sum compensation would not seem to be easily possible, since a direct relation with real and actual incurred costs is necessary. At the same time, the design of a

43 *Bernard*, paragraph 40.

44 Currently, a new version of the French Labour Code is applicable. Information of current and older versions can be obtained at www.legifrance.gouv.fr/.

45 *Bernard*, paragraph 47.

46 *Bernard*, paragraph 48.

47 Cf. R. Blanpain and C. Grant (eds.), *Fixed-term employment contracts. A comparative study*, Bruges Vanden Broele, 2009, 441p.

lump sum calculation of damages, in an employment law context, including the case of breach of a fixed-term contract, may have certain advantages (e.g. legal certainty) and would probably, for the employer, still relate to lost investment in his employee, although not exclusively as incurred damages may relate to, for example, costs of finding and hiring an equally qualified replacement.

The (implicit) suggestion made in *Bernard* would be that a distinction is to be made between damages for breach on the one hand, and reimbursement of training costs on the other hand. It may be remembered that this issue has also been dealt with in the *Webster* case[48] of the Court of Arbitration for Sport (CAS). The situation of Webster, a football player who transferred from *Hearts* to *Wigan*, before the end of his fixed term-employment contract, was qualified as "a breach of contract".[49] Therefore, the CAS went into the issue of establishing criteria for the calculation of the compensation in case a fixed-term contract of employment was terminated. The CAS Panel clearly stated that "compensation for unilateral termination without cause should not be punitive or lead to enrichment and should be calculated on the basis of criteria that tend to ensure clubs and players are put on equal footing in terms of the compensation they can claim or are required to pay. In addition, it is in the interest of the football world that the criteria applicable in a given type of situation and therefore the method of calculation of the compensation be as predictable as possible".[50]

In search for a method of calculating the damages for the player's breach of contract, the CAS Panel noted that a distinction should be drawn between the contract stability issue (Article 17 of the FIFA Regulations) and training compensation: "A second preliminary point is that according to the wording of its first paragraph Article 17 is not intended to deal directly with Training Compensation – such compensation being specially regulated in detail by other provisions of the FIFA Status Regulations."[51] Then it continues: "The Panel finds therefore that in determining the level of compensation payable to Hearts under Article 17 of the FIFA Status Regulations as a result of the Player's unilateral termination without cause, the amounts having been invested by the Club in training and developing the Player are irrelevant, i.e. are not factors that come into consideration under Article 17. Consequently, the Panel disagrees with Heart's submission that among the relevant circumstances in calculating compensation for unilateral termination under Article 17 *"… is the sporting and financial investment*

48 Arbitration CAS 2007/A/1298 Wigan Athletic FC v/ Heart of Midlothian & CAS 2007/A/1299 Heart of Midlothian v/ Webster & Wigan Athletic FC & CAS 2007/A/1300 Webster v/ Heart of Midlothian, award of 30 January 2008 (further referred to as "CAS, *Webster*"); For comments and analysis, see: I. Blackshaw, "The CAS Appeal Decision in the Andrew Webster cas", Int. Sports Law J. 2008, Nr. 1–2, 14; F. de Weger, "The Webster Case: Justified Panic as there was after Bosman?", Int. Sports Law J. 2008, Nr. 1–2, 20.

49 CAS, *Webster*, paragraph 118.

50 CAS, *Webster*, Paragraph 73.

51 CAS, *Webster*, Paragraph 54.

Hearts has made in training and developing the Player during the last 5 years".[52] It is known that, as far as the calculation for damages of breach of contract is concerned, the CAS opted for a calculation of damages based on the "residual value" of the contract, i.e. the payment of "the remuneration remaining due to the Player under the employment contact upon its date of termination, which the parties have referred to as the residual value of the contract."[53]

The *Bernard* case leaves room for interpretation and discussion. In the case, it is not made very explicit how the shift is to be made between the determination of 'compensation for breach' and the calculation of 'training compensation'. Taking into account the facts of the case, it seems likely that the French Football 'Charter', holding Bernard's obligation to sign his first professional contract with the training club, including no specific sanction otherwise, but for a non-competition clause (at least within France), has been decisive in (implicitely) qualifying the employer's claim and the subsequent award for damages, as a compensation of training costs. Also the Court of Appeal of Lyon, who considered the Charter's provisions as illegal, paid much attention to the fact that the training club was entitled to propose a professional contract to the player, whereby only if the club would not make use of this prerogative, the player would be free to go to another club. But if the training club would make the offer, the player who refused, was not entitled to play for another club in France for a period of three years without the training club's consent. The Court of Appeal, furthermore, stressed that the Charter did not provide a training compensation clause.[54] Nonetheless, there remains some room for discussion. If national employment termination laws would apply a system of lump sum based calculation of damages for breach, such as damages based on the residual value of the employment contract, the question remains what the *Bernard* judgment means with regard to the conditions of including the item of lost investment in training. It is, furthermore, predictable that the *Bernard* case will be used to challenge non-competition clauses in employment contracts under EU free movement law.

3. JUSTIFIED TRAINING COMPENSATION UNDER EU FREE MOVEMENT LAW

On the basis of the case law of the European Court of Justice, as developed in *Bosman* and *Bernard*, taking into account the considerations of both the respective Advocates-General as well as those of the Court itself, an attempt can be made to synthesise the conditions of justification of training compensation schemes under European free movement law.

52 CAS, *Webster*, Paragraph 55.

53 CAS, *Webster*, Paragraph 87.

54 Cour d'Appel de Lyon, Chambre Sociale, Arrêt du 26 février 2007, R.G. 03/06278.

In *Bosman*, as well as in *Bernard*, the Court accepted the principle that training compensation schemes may be acceptable, as it made clear that "in view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate".[55]

It would, however, seem that the following conditions should be met:

1. *Reimbursment of real costs*: Both the *Bosman* and *Bernard* rulings make clear that training compensation must be related to the real and actual costs of training.[56] As the Advocate-General in the Bosman case stated, "the transfer fee would actually have to be limited to the amount expended by the previous club (or previous clubs) for the player's training."[57]

2. *Individual and global costs*: The Court has accepted that not only individual costs, but also a relevant proportion of a club's global training costs may be part of the training compensation. In both *Bosman* and *Bernard* the degree of difficulty of calculating (real and actually incurred) individual training costs has been addressed. In *Bosman*, it is suggested that this is problematic "because it is impossible to predict the sporting future of young players with any certainty and because only a limited number of such players go on to play professionally, those fees are by nature contingent and uncertain".[58] Also in *Bernard*, the Court has remarked that "investments in training made by the clubs providing it are uncertain by their very nature"[59] In *Bernard*, the Advocate-General, adopts the view that, "since only a minority of trainee players will prove to have any subsequent market value in professional football, whereas a significantly greater number must be trained in order for that minority to be revealed, investment in training would be discouraged if only the cost of training the individual player were taken into account when determining the appropriate compensation. It is therefore appropriate for a club employing a player who has been trained by another club to pay compensation which represents a relevant proportion of that other club's overall training costs."[60] The Court's words in *Bernard* are slightly different but seem to stay at the same bottom line in referring to "taking due account of the costs borne by the clubs in training both future professional players and those who will never play professionally".[61] The Court does not refer to the Advcoate-General's opinion that, "if the player himself were to bear any liability to pay training compensation, the

55 *Bosman*, paragraph 106.

56 Cf. *Bosman*, paragraph 109; *Bernard*, paragraph 50.

57 AG Lenz, *Bosman*, paragraph 239.

58 *Bosman*, paragraph 109.

59 *Bernard*, paragraph 42.

60 AG Sharpston, *Bernard*, paragraph 52.

61 *Bernard*, paragraph 45.

amount should be calculated only on the basis of the individual cost of training him, regardless of overall training costs."[62]

3. *Proportionate mechanism for different training clubs*: According to the Advocate-General, "it may transpire that the training of a particular player has been provided by more than one club, so that any compensation due should, by some appropriate mechanism, be shared *pro rata* among the clubs in question."[63]

4. *Decreasing obligation*: In the *Bosman* case, the Advocate-general pointed out that, for a training compensation to be valid, it "would come into question only in the case of a first change of clubs where the previous club had trained the player. Analogous to the transfer rules in force in France, that transfer fee would in addition have to be reduced proportionately for every year the player had spent with that club after being trained, since during that period the training club will have had an opportunity to benefit from its investment in the player."[64] The obligation to pay a reimbursement of training costs must, therefore decrease over time. In other words, the longer an employer (club) has been able to receive return on its investment in the training of a given player, the higher the free movement should be respected.

5. *Payment by club or player*: The Advocate-general pointed out, in the *Bernard* case, that the validity of a training compensation scheme should not always require that only the employer (cf. the player's new club) should be liable for payment. As the Advocate-General in *Bernard* points out: "I am less convinced by a third concern which has been voiced, namely that the liability to pay the compensation should lie only on the new employer and not on the former trainee".[65] The Advocate-General explaines that "such considerations will, however, vary according to the way in which training is generally organised in a particular sector. If, as appears to be the case, training of professional footballers is normally at the clubs' expense, then a system of compensation between clubs, not involving the players themselves, seems appropriate."[66]

There may nevertheless be a difference in calculation, depending on who is liable for payment of training compensation. According to the Advcoate-General, "if the player himself were to bear any liability to pay training compensation, the amount should be calculated only on the basis of the individual cost of training him, regardless of overall training costs."[67]

6. *Free movement not impossible*: Both in *Bosman* as well as in *Bernard* it has been emphasised that any system of training compensation should be proportionate in relation to the limitation of the free movement of workers and not go beyond what is

62 AG Sharpston, *Bernard*, paragraph 57.

63 AG Sharpston, *Bernard*, 53.

64 AG Lenz, *Bosman*, paragraph 239.

65 AG Sharpston, *Bernard*, paragraph 55.

66 AG Sharpston, *Bernard*, paragraph 57.

67 AG Sharpston, *Bernard*, paragraph 57.

necessary.[68] This would imply that the amounts calculated for training compensation may pose a limitation, but should not put a disproportionate burden on the free movement of workers. Arguably, this limits the amounts that can be asked for training compensation. It is not very clear, however, what amount would exactly be allowed or rejected under free movement law. Furthermore, rather than focusing on its height or any maximum of the amount,[69] the Court rather criticised the unspecified (lump sum) nature of the training compensation due to the absence of established and predetermined criteria for its calculation.[70] But there is room to assume that, even with a predefined and duly calculated amount of training compensation, a disproportional limitation of the free movement of workers may still arise, taking into account the height of the amount. The question has been somewhat indirectly touched by the Advocate-General in the *Bosman* case. He stated: "Nor can it seriously be argued that a player, for example, who is transferred for a fee of one million ECU[71] caused his previous club to incur training costs amounting to that vast sum".[72] This opinion may be linked to the difficulty of matching real costs of training with such a high amount. But it may also be seen in light of the degree of interference with the free movement of workers.

CONCLUSIONS

The *Bosman* case was (and still is) seen as the most significant case in the series of sport case law that the European Court of Justice has produced. At the time, it was highly commented and discussed in public and academic media. The *Bosman* case, for sure, still earns this landmark status. In comparison, the *Bernard* case is less widely known and discussed, although it is quite clear that it is a natural follow-up of the *Bosman* case and its relevance also seems to go beyond the interests of the sport sector. The free movement cases, not so surprising, touch important aspects of employment law. In *Bernard*, the issue of human capital investment of employers is at stake. It leaves some room for further discussion as this is a broader problem in employment law in general although, in the case at hand, it is translated to the specific football sector. It shows that there is a strong relationship between two of the central issues already at stake in the *Bosman* case, underlying the (old) transfer system: development and training of young players and contract stability. In *Bernard*, the breach of a (collectively agreed) promise

68 *Bosman*, paragraph 104; *Bernard*, paragraph 38, 48.

69 In *Bernard*, the damages were set by the French *Conseil de prud'hommes* at 22 867.35 Euro (cf. *Bernard*, paragraph 11; the original amount claimed was 53 357.16 Euro, cf. *Bernard*, paragraph 10).

70 Cf. *Bernard*, paragraphs 46 and 47.

71 Comparable with one million Euro (ECU stands for European Currency Unit, an old unit used to indicate a basket of national European currencies, before the introduction of the Euro).

72 AG Lenz, *Bosman*, 237.

to play after having completed a training period seems to stand at the junction of both contract stability (from the facts it seems that, according to French employment law, a fixed-term contract was unlawfully terminated by Bernard and damages needed to be determined) and training compensation (the calculation of the damages should correspond with real and actually incurred training costs). It does not always appear very clear how these two issues are to be kept apart (although in the FIFA rules, as in the *Webster* case,[73] they remain separate issues). It would, eventually, seem that the (new) FIFA regulations on the status and transfer of players receive a large degree of implicit approval by the Court – but for the height of the amounts actually paid during players' transfers, which may run into rather high numbers. On this latter point, the *Bosman* case, including the Advocate-General's opinion, might still be relevant. While the Court, in *Bernard*, seems to have been willing to accommodate the logics of the sports labour market, the *Bosman*-principles remain quite leading in its case law.

[73] See above: Arbitration CAS 2007/A/1298 Wigan Athletic FC v/ Heart of Midlothian & CAS 2007/A/1299 Heart of Midlothian v/ Webster & Wigan Athletic FC & CAS 2007/A/1300 Webster v/ Heart of Midlothian, award of 30 January 2008.